



NATIONAL INDIAN EDUCATION ASSOCIATION

June 18, 2019

Kathleen McHugh, Director,
Policy Division, Children's Bureau
Administration for Children and Families
U.S. Department of Health and Human Services
330 C St SW
Washington, DC 20201

Re: Proposed Changes to Indian Child Welfare Act (ICWA) Data Elements in the Adoption and Foster Care Analysis and Reporting System (AFCARS) – [Docket ID: ACF-2018-0003, RIN: 0970-AC72]

Dear Director McHugh:

On behalf of the National Indian Education Association (NIEA), I respectfully submit the following written comments in response to the Administration for Children and Families' (ACF) proposed changes to current data collection requirements related to Native children and the Indian Child Welfare Act (ICWA) in the Adoption and Foster Care Analysis and Reporting System (AFCARS).

NIEA is the nation's most inclusive organization advocating for improved educational opportunities for American Indians, Alaska Natives, and Native Hawaiians. Our mission centers on ensuring that Native students have access to a high-quality academic and cultural education, a goal that is only possible if ACF upholds the federal trust responsibility, a moral obligation towards tribes.

On April 19, 2019, ACF published a notice of proposed rulemaking (NPRM) which proposes to eliminate 90 percent of the AFCARS data elements relating to Native children in state child welfare systems and applicable requirements of ICWA. Following a rulemaking process in 2016, ACF has begun to implement a final rule that contained approximately 60 data elements related to ICWA. Though states are only now beginning to see the first results from this implementation process, ACF has proposed to retain only five of these data elements in the current NPRM. NIEA urges ACF to reconsider the elimination of these critical data elements, which support effective child welfare systems and implementation of federal statute.

Federal Trust Responsibility

Established through treaties, federal law, and U.S. Supreme Court decisions, ACF has a federal trust responsibility to provide parity in access to excellent education options to all American Indians and Alaska Natives, regardless of where they live or attend school. Federal services and programs that support strong, healthy students are critical to ensuring equity in education for Native children across the country. ACF and the U.S. Department of Health and Human Services have a unique responsibility to fulfill this federal trust relationship by ensuring access to services and programs that support strong, healthy students prepared to thrive in the classroom and beyond.

Lack of Meaningful Tribal Consultation

NIEA is deeply concerned that tribal consultation has not occurred in accordance with ACF principles for working with federally-recognized tribes. In the 2016 final rule, these principles explicitly state that:

“ACF recognizes that the government-to-government relationship with Indian tribes merits regular, meaningful, and informed consultation with AI/AN tribal officials in the development of new or amended funding; amended funding formulas; and programmatic policies, regulations, and legislative actions initiated by ACF that affect or may affect tribes.”

By making the decision to eliminate 90 percent of data elements related to ICWA and Native students, ACF has failed to meet the threshold for “regular, meaningful, and informed consultation” with tribes. The current NPRM lists several meetings as consultation, but ACF did not inform tribes that these meetings would constitute consultation or specifically address the issues of concern to tribal leaders and representatives in attendance. In addition, both the advanced notice of proposed rulemaking and NPRM focused almost entirely on the perceived burden to states with little consideration given to the benefits of data collection for Native families. Such conduct does not meet the definition of meaningful or informed consultation and fails to uphold the ACF’s federal trust responsibility to tribes.

Importance of Current ICWA Data Elements

Tribes, states, federal agencies, and legislators must have access to strong data systems to fully inform policies and programs that serve Native children and families. Though the current NPRM retains five data elements related to Native children, the 56 eliminated elements are critical to fulfilling statutory requirements under ICWA and understanding the unique issues that impact Native children in state welfare systems.

Under ICWA, ACF is charged with ensuring that states consult with tribes on state actions to comply with the law.¹ ICWA data elements from the 2016 rule remain critical to assessing state engagement with tribes to support ICWA implementation and opportunities for improvement. In addition, many ICWA data elements slated for elimination have the potential to support implementation of the Family First Prevention Services Act in tribal communities.

Since AFCARS is the only federal data system with the ability to capture data related to child placement, ACF is best positioned to collect critical data to support Native children and families in child welfare systems. Other federal agencies, including the Department of Interior and Bureau of Indian Affairs, do not have necessary state partnerships, databases, or resources to collect data on Native children in state foster care systems. Unfortunately, many states do not collect this data and local data remains scarce. Though ACF indicates that alternative research or surveys could fill this data collection void, such methodologies have historically produced unreliable and inconsistent data related to Native children and communities.

Due to these issues, tribes are forced to piece together bits of information from whatever sources are available to identify discrepancies in state ICWA caseloads or to identify practice issues that need

¹ 42 U.S.C.(b)(9).

improvement. The 2016 AFCARS data elements sought to address these challenges and provide a consistent set of data to address ICWA challenges and other child welfare issues.

Several of the 2016 ICWA data elements proposed for elimination provide important information that inform case planning and efforts to improve outcomes for Native children in child welfare systems. Much of this data, including the elements highlighted below, should be easily retrievable from any case file and have the potential to improve child welfare service delivery and implementation across the nation.

- **Date of court determination of ICWA application.** ACF has proposed to eliminate this element, which indicates significant differences state court and state IV-E agency confirmation of ICWA applications and provides insight into the impact of such differences on implementation of federal statute.
- **Transfer of jurisdiction.** ACF has proposed to eliminate data elements that provide critical information on the status and basis for denial of a transfer of jurisdiction, a decision that would obscure the reasoning and impact of transfers on service provision or case planning.
- **Foster care placement preferences.** Though proposed changes would identify whether a placement involves a relative or someone that is a member of a tribe, proposed data elements fail to provide information regarding whether a tribal placement preference was used that could be different than ICWA's, whether there was a good cause to deviate from the placement preferences, and the basis for good cause. In addition, proposed changes would not indicate whether a tribe approved of the placement if in a congregate care setting.
- **Adoptive placement preferences.** While the NPRM proposes to identify whether a placement involves a relative or someone that is a member of a tribe it does not provide information on whether a tribal placement preference was used that could be different than ICWA's, whether the good cause was found to deviate from the placement preferences, and the basis for good cause.
- **ICWA notice on foster care placement and termination of parental rights to tribes and parents.** ACF has proposed to only track whether notice was sent by the state IV-E agency, creating flaws by modifying the current data element. Such a proposal would not provide information on whether the notice was sent within ICWA's statutory timelines, or whether it was sent to both parents and the child's tribe. These notifications are critical to ensuring that parents and tribes have the ability to participate in case planning, placement decisions, and court proceedings. Analyzing data from the proposed data element could lead to erroneous conclusions regarding whether states met statutory requirements under ICWA. In addition, the modified notice data element also does not track if the notice was sent by the state court instead of the state IV-E agency.

Current ICWA Data Collection Requirements are Manageable for State IV-E Agencies

When negotiating current rules, ACF already weighed and addressed the data collection burden placed on states. In 2016, ACF concluded the burden placed on states was manageable and necessary due to the lack of basic data for Native children and the benefits for policy development, technical assistance and training, and programming.

In addition, ACF and state estimates of burden are based in part upon a misunderstanding of ICWA application. Only three of the ICWA data elements from the 2016 final rule would need to be asked of every child in state custody.

- 1) Was inquiry into whether the child is a member or eligible for membership within a federally-recognized tribe conducted?
- 2) Is the child a member or eligible for membership in a federally-recognized tribe and if so, which tribe(s)?
- 3) Does ICWA apply?

The questions above are necessary to determine if ICWA applies, while other data elements in the 2016 final rule would only be required if ICWA does apply. Only nine states have foster care placement rates where ICWA might apply to over 4 percent of the total state foster care population.

As states have begun integrating the 2016 Final Rule ICWA data elements, many have found the resulting data helpful in addressing ICWA implementation challenges, policy development, and program management effectively. NIEA urges ACF to maintain all of the current data requirements, which are critical to supporting our children through healthy child welfare systems and effective implementation of federal statute.

Conclusion

Data collection regarding Native children and ICWA implementation is critical to supporting healthy students that thrive in the classroom and beyond. NIEA urges ACF to reconsider the elimination of critical data elements that support children in tribal communities and to engage in “regular, meaningful, and informed consultation” with tribes on any future proposal to eliminate or modify such data. We look forward to working with ACF to ensure that the federal government is fulfilling its trust responsibility to tribes and their citizens.

For more information or inquiries, please contact Adrienne Elliott, NIEA Legislative Analyst, at aelliott@niea.org.

Sincerely,



Robin Butterfield
President